RECENT CASES.

CARRIERS.

Rebates Under English Railway Acts

The King's Bench, in *Holwell Iron Co.* v. *Midland Railway,* L. R. 1 K. B. (1909) 486, held that payment for railway services need not necessarily be in cash; and that an agreement with a railway which is fair and reasonable will not be upset merely because it involves a rebate.

(For a full discussion see note p. 566 of this issue.)

CONTRACTS.

Impossibility of Performance

An agreement whereby A is to occupy space in a building, for the mutual benefit of both parties, is rendered void by a fire which destroys the building. (*Emerich Outfitting Co.* v. *Siegel-Cooper Co.*, 86 N. E. 1104, Illinois.)

(For a full discussion see note p. 569 of this issue.)

Privity: Liabilities of Assignees

A street railway company holding a franchise to build its line on a city street mortgaged all its property, and thereafter entered into a contract with a railroad company, whereby it was agreed, in consequence of the latter company's permission to cross its track, which crossed the street at right angles, to bear the expense of the construction and maintenance of the crossing. Later the company's mortgage was foreclosed and appellant bought it in at the sale. It was held in suit by one of the original parties to the contract (appellee) against the assignee of the other, that there was no privity of contract between the parties and a purchaser of all the rights, franchise and property of the street railway company at the foreclosure sale, and that therefore the purchaser was not liable on the contract. *Evansville & S. I. Co.* v. *Evansville Belt Rwy. Co.,* 87 N. E. 21.

The obligations of a contract are ordinarily limited to the parties by whom they are made, and those who stand in privity with them either in estate or contract. *Spencer's Case,* 1 Smith's Lead Cas. 8th Ed. 168; *Webb* v. *Russell,* 3 T. R. 393.

Privity of estate that can render parties liable upon contracts not of their own making relate solely to covenants run-

CONTRACTS (Continued).

ning with the land or some interest therein. *Keppel* v. *Bailey,* 2 M. & K. 517. Here there was no estate, title or interest in any land to which the contract sued on related, and therefore no liability could attach to the appellant on this ground.

Privity of contract was also absent, since the appellants or transferees got their title not by contract with, or transfer from the street-car company, but by purchase of the same at a sale thereof, made under a decree of foreclosure of a mortgage thereon, antedating the contract sued on.

There was, therefore, neither privity of estate nor privity of contract between the purchasers and the original parties to the arrangements that would render the former liable thereon.

It does not appear from the circumstances of the case that any work had been done by the purchasing company on the crossing. An interesting question would have arisen in that event as to how much work would constitute a practical assumption of the liabilities of the contract. As it is, the case is one of a thousand.

CRIMINAL LAW.

Necessity of "Retreat to the Wall"

Prisoner had had a quarrel with deceased; the latter went away and in a short time returned to get his coat. Prisoner was standing outside his own dwelling, and as deceased advance he shot him. *Held* (as dictum), a person no longer need flee from danger of personal injury at the hand of another rather than strike him down to avert it, if that danger is honest, the reasonable apprehension is of the grade mentioned, and such striking is so apprehended to be necessary, and such danger is not produced by such person's wrong. *Miller* v. *State,* 119 N. W. 850, Wis.

The doctrine of fleeing to the wall in self-defense is of long standing, and is still a much mooted question. Blackstone, in his Commentaries, states the necessity of flight where practicable in self-defense to be the only safe and just rule, (vol. IV, p. 185), and it was for a long time considered settled law. A conflict has since arisen, however, as to the justice of requiring a man to flee when attacked, and this conflict is nowhere better illustrated than in the Supreme Court of the United States. In the case of *Beard* v. *U. S.,* 158 U. S. 550 (1895), the Court expressly decided that one need not retreat when he is in a place "where he has a right to be," though the conclusion is dictum, as in that case the prisoner was on his

CRIMINAL LAW (Continued).

own grounds at the time of the shooting. In the case of *Allen* v. *U. S.*, in 164 U. S. 492, decided one year later, Mr. Justice Brown, in delivering the opinion of the Court, carefully limited the doctrine of *Beard* v. *U. S.* to the case where the prisoner was on his own premises. Only a few pages beyond in the same report Mr. Justice Harlan in delivering the opinion in the case of *Rowe* v. *U. S.*, 164 U. S. 546 (1896), expressly applies the dictum in *Beard* v. *U. S.* to the facts of the case before him, and dispenses with the necessity of retreat where both parties were in a hotel. The Belgian courts have made an interesting distinction, and do not require retreat in the case of "soldiers or gentlemen." (Pandectes Belges, Vol. 16, p. 802.) Pennsylvania has followed the old doctrine requiring retreat (*Commonwealth* v. *Drum*, 58 Pa. 9), and at the present time this still appears to be supported by the weight of authority. 16 H. L. R., p. 567.

Homicide: Provocation: Self-Defense

On appeal from a conviction for murder, the following charge of the trial court was sustained as correct: "If a man picks a quarrel with his fellow and kills his fellow, the law denies him the plea of self-defense. If the defendant used language toward the deceased that a reasonable man would expect to bring on a fight, then the law denies him the plea of self-defense." *State* v. *Hunter*, 63 S. E. (S. C.) 685.

There is some authority for this doctrine, (*State* v. *Rowell*, 75 S. C. 510; *Baldwin* v. *State*, 111 Ala. 11), but an examination of its results will prove it both unsound and unjust. In *Smith* v. *State*, 8 Lea (Tenn.) 402, its fallacy was pointed out by the following reasoning. It is universally *held* that no words can amount to an assault. Therefore when one person assaults another as a result of opprobrious words spoken by the latter, the assailant is the first aggressor in the eye of the law. And yet under the doctrine of the principal case, if the assaulted party engage in the fight, he is guilty of assault and battery.

So also in *State* v. *Suller*, 82 Mo. 623, the doctrine of the principal case was shown to lead to the following ridiculous result: A party beginning an altercation is defenseless before a resulting assault or a murder if he successfully resist it.

It is universally held that one who assaults another will, nevertheless, have the right of self-defense if the assault is repelled by an unreasonably excessive amount of force; and, yet, under the doctrine under discussion, a person who used

CRIMINAL LAW (Continued).

opprobrious language to another would not have the right of self-defense no matter what amount of force was used in return.

The same criticism applies to a doctrine denying the plea of self-defense to one who by words provokes an assault for the purpose of chastising his assailant as was held in *Gibson* v. State, 89 Ala. 121.

The best rule and the one most generally recognized is that the right of self-defense is denied only to him who provokes a difficulty with the intent to kill or do great bodily harm. *State* v. *Culler, supra, Bennett* v. *State,* 100 Ind. 171; *Matthews* v. *State,* 100 Tex. Cr. R. 31.

EQUITY.

Specific Performance: Fraudulent Representations

A written contract was entered into between one Urdangen and the defendants, by which the latter agreed to trade certain tracts of land for a stock of goods. The name that Urdangen signed was "New York Brokerage Co.," but defendants believed that Urdangen was doing business under that name and Urdangen represented that he was the owner of the goods in question. In fact the contract was made by Urdangen on behalf of the New York Brokerage Co., which subsequently sought to obtain specific performance of the contract. In refusing the relief sought the Court put its decision on the ground, among others, that the false representations of Urdangen induced defendants to believe that they were doing business with Urdangen, and that he was the owner of the goods. "It is the right of a party," said the Court, "to know with whom he deals, unless he consents to deal with an agent on behalf of an undisclosed principal." *New York Brokerage Co.* v. *Wharton,* 119 N. W. (Iowa) 969.

This is an example of a well-recognized class of cases, in which specific performance is refused on the ground that there were fraudulent representations as to the identity of the adversary party. For the purpose of defeating the extraordinary remedy of specific performance, such fraudulent representations appear always to be considered material (*Ellsworth* v. Randall, 78 Ia. 141), although at law such misrepresentations constitute a valid defense only when the identity of the party is an essential element of the contract. 1 Page on Contracts, § 62.

EQUITY (Continued).

It is not clear from the opinion whether the court denied the right of an undisclosed principal to obtain specific performance of a contract made by his agent or not. In the extract quoted above such a case seems to be expressly excepted from the principle laid down, but at the close of the same paragraph of the opinion it is strongly intimated that an undisclosed principal would not be granted this remedy. The question has never come up, except, as in the principal case, in connection with fraud, sufficient, of itself, to bar the remedy.

EVIDENCE.

Presumptions: Laws of Other States

Plaintiffs, claiming as heirs and administrators of X, deceased, averring mental incompetency on the part of X, brought suit to rescind a contract entered into between X and defendant in the purchase of X's reversionary interest under the will of Y, deceased. Defendant pleaded a judgment in another state (New York) brought by the executors of the will Y against X and the present defendant. It was proved that X had died before judgment in the case had been rendered, and the question was whether the judgment in New York estopped plaintiffs at bar, claiming under X as against defendant, who was a co-defendant in that action. The statutes of the home state (Wisconsin) ruled that such a judgment would not have affected the deceased or his interest in the subject of action. The court had evidence that the statutes of New York were of similar import, but said that in any case they were authorized to presume that the same statutes existed in New York *Mochleupah* v. *Mayhew,* 119 N. W. 827.

Where a foreign rule controls, it must be proved like any other *factum probandum.* Wigmore Evidence § 2536. In these cases, in order to facilitate matters, certain presumptions are resorted to. If it is the law of a state possessing the English Common Law as the foundation of its system—in particular, one of the United States—it is then presumed that that law is the same as the law of the former. *Pattillo* v. *Alexander,* 96 Ga. 60; *Houghtaling* v. *Ball,* 19 Mo. 84. Some courts, including those of Wisconsin, as shown by the case in hand, extend this rule even to cases involving the existence of statutory enactments (*Cavallero* v. *R. R.,* 42 Pac. 918), but a large number of others draw the distinction here and confine the presumption to the common or judicially declared law. This

EVIDENCE (Continued).

latter distinction, which appears at first sight somewhat illogical, was drawn in a recent Virginia case (*Mountain Land Co.* v. *Blair,* 63 S. E. 751), in which the statutes of a sister state were not recognized by presumption. The jurisdictions seemed almost equally devided on the question.

Trespass: Fraud

Defendant, through its agent, obtained a right of way over plaintiff's land, by assuring her, first, that no damage would be done to the land, and secondly, that it was of no moment whether plaintiff objected or not, since defendant had the privilege of coming on the land in any event by governmental sanction. Both of these representations were absolutely false, but plaintiff, who was an ignorant woman, was thereby induced to sign a contract permitting the passage of wires over her plantation. Defendants entered, cut down many trees, and plaintiff sues in trespass. It was *held* that since the grant was obtained by fraud, or was no grant at all, that defendant therefore came in without permission, and was liable as a trespasser for damages. *Brown* v. *Am. Tel. Co.,* 63 S. E. 744.

This is severe but safe law. Defendant knew it was making false representations to plaintiff and obtained permission to enter the land by fraud. Whatever rights it had, it acquired solely by the fraud it practiced on plaintiff. It had no right to profit by its fraud; it had no right to rely on the consent of the owner of the property to its entering as a business invitee, when it had obtained that consent merely by gross misrepresentations. Accordingly, there was not that meeting of the minds essential to a valid contract. Defendant was in no better position than a trespasser.

This principle has been affirmed in other jurisdictions, and is chiefly met with in cases of passengers suing for injuries received while riding on a ticket or pass got by a fraud from the defendant railroad company. *Toledo, Wabash & Western R. R. Co.* v. *Beggs,* 85 Ill. 80; *Way* v. *Chicago, Rock Island & Pacific Rwy. Co.,* 64 Iowa, 48. Perhaps the nearest case was that of *Fitzmaurice* v. *N. Y., N. H. & H. R. R.,* 192 Mass. 159, decided by the Massachusetts Supreme Court in 1906, wherein a girl who had falsely represented to the company that she was a school girl under eighteen years of age and thereby got a special-rate ticket, was injured in a railway collision and was prevented from recovering because the license was obtained by fraud.

LIBEL AND SLANDER.

Criminal Liability for Criticism of Public Officers

Defendant's newspaper published an article accusing the prosecutor, who was county treasurer, of "illegally filching money," etc. The defendant was not aware personally of the publication of the article. *Held,* the article exceeded public privilege, the word "filch" imputed a crime, and for truth to be a defense under the statute, it must be published with good motives. *People* v. *Fuller,* 87 N. E. 336 (Ill.).

While privileged discussion of public officers presents questions not free from difficulty, in this case the privilege was so clearly exceeded that the court had no trouble in dismissing that defense on the authority of *Rearick* v. *Wilson,* 81 Ill. 77. The only other defense seriously offered was that of truth, but it appeared that not only were the statements not strictly true, but that the good motive required by statute was supplanted by malice.

MALICIOUS PROSECUTION.

Institution of Civil Suit

In the case of *Keithley* v. *Stevens,* 87 N. E. Rep. 375, action was brought for the malicious abuse of process. The evidence offered by the plaintiff was to the effect that defendant had maliciously instituted a suit for his disbarment, and by bribing witnesses had caused the judgment to go against plaintiff. There was no proof that when the process against the plaintiff was once issued, it was improperly issued; it was merely improperly caused to be issued. There was no seizure of the person or goods of the plaintiff.

Held, malicious institution of civil suits does not constitute a malicious abuse of process, as the action lies for an improper use of process after it has been issued, and not for maliciously causing it to be issued.

The essential elements of an action for malicious abuse of process are clearly laid down in the case of *Bonney* v. *King,* 201 Ill. 47. There must be first, the existence of an ulterior purpose; and, second, an action in the use of the process not proper in the regular prosecution of the proceeding.

NEGLIGENCE.

Plaintiff's infant son was killed by the fall of a lumber pile in defendant's lumber yard, while watching some other boys fly a kite. There was evidence that the pile was in a dangerous condition, and that the deceased and his companions had not always been forbidden to play in the lumber yard. Recovery was denied on the ground that deceased was a trespasser, and that the pile was not a dangerous instrumentality likely to attract children. *Kelly* v. *Bevas,* 116 S. W. (Mo.) 557.

Affirmative Obligations Toward Trespassers: Doctrine of the "Turn-Table Cases"

The general rule with regard to the duty of a landowner toward trespassers is that he is liable only for an act of commission, done with reference to the trespassers presence, likely to cause injury and causing such injury. *Palmer* v. *Gordon,* 173 Mass. 410.

There is a widely recognized exception to this rule (which, however, is not in force in Pennsylvania, New York, New Jersey or Massachusetts), to the effect that a real estate owner is liable for injury to infant trespassers, when it results from an artificial condition created on the premises, dangerous through the omission of some precaution compatible with the use thereof, and of such a nature and so situated as to hold out a constructive invitation to children. *Edgington* v. *Burlington, Cedar Rapids & Northern Ry. Co.,* 116 Ia. 410. In the principal case the court states the necessity of maintaining the present narrow limits of so extreme a doctrine, and wisely holds a lumber pile not to be such an instrumentality as to constitute a trap for children.

SALES.

The Supreme Court of the United States, in *Waters-Pierce Oil Co.* v. *Beselus,* 29 Supreme Court Rep. 270, *held,* that where B sold coal oil to A and A resold to X, who was injured by an explosion caused by gasoline in the coal oil, B was liable therefor.

Sale of Dangerous Article

(For a full discussion of the principles involved see note, p. 563 of this issue.)

SALES (Continued).

Morgan v. *Russell & Sons,* 1 K. B. D. (Part III) (1909) 357. The plaintiff and defendants entered into an agreement whereby the defendants agreed to sell certain slag on a piece of land to the plaintiff and to give him the right to enter upon the land and take away as much slag as he wanted, paying 2s. 3d. a ton therefor. The slag in question had been tipped upon the land a long time before and had become a part of the soil. After the plaintiff had removed several tons the defendants refused to allow them to take any more. The question to be determined was whether the slag was within the term "Goods" as defined by the Sale of Goods Act of 1893, Sec. 62, so as to allow the plaintiff to recover as damages the difference between the contract price and the market price, as provided by Section 51 of the same act.

Meaning of the Term "Goods"

Held, that the agreement was not within Sec. 62 of Sale of Goods Act, 1893. The contract was not for the sale of any separate thing, but appears to be exactly analogous to a contract which gives a man a right to enter upon the land with liberty to dig from the earth *in situ* so much gravel, earth or coal on payment of a price per ton.

Sec. 62 of Sale of Goods Act is as follows: " 'Goods' includes all chattels personal other than things in action and money. * * * The term includes emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before or under the contract of sale."

The words "attached to and forming part of the land" appear to apply to things such as emblements and crops and do not apply to anything that is a part of the land, as a gravel bed or a section of the earth itself.

STATUTE OF FRAUDS.

A promise by A to give B certain property if B would support A and his wife during the remainder of their lives was taken out of the Statute of Frauds by possession and performance by B. *Taylor* v. *Taylor,* 99 Pac. 814 (Kansas).

Possession as Part Performance

(For a full discussion of the principle involved, see note, p. 573 of this issue.)

TRUSTS.

Creation of Trusts Testamentary in Character

One Lever transferred to trustees her deposits in certain savings banks in trust for herself for life, and after her death, upon several other trusts. She reserved an express power of revocation, and also the right to demand of the trustee at any time any sum of money not in excess of the balance of the trust money then in the hands of the trustee. *Held,* though the reservation of the power of revocation did not of itself render the trust invalid, yet during her life the property was at her absolute disposal, and all the trustee had to do was to collect and hold the property; hence the only material effect of the instrument was testamentary and could not be enforced on account of the statute requiring a duly executed will. *McEvoy* v. *Boston Savings Bank,* 87 N. E. 465 (Mass.).

It is almost universally agreed that the mere reservation of a power of revocation does not invalidate an otherwise validly created trust (Cent. Dig., Vol. 47, § 80), and the case becomes, therefore, chiefly interesting as determining what state of facts presents such a complete retention of control by the settlor as to amount to a nullification of the trust for all practical purposes. It had been decided by the same court a short time before that reception of the income during life, coupled with the retention of the power to alter the post mortem disposition of the property constituted a validly created trust (*Kelley* v. *Snow,* 70 N. E. 89); but that case was distinguished by saying that there the settlor could not affect the *amount* of the property to be disposed of, but only its disposition, while here the testatrix could change the entire trust at any time, so that during the life of the testatrix the trust was a mere cloak for a testamentary disposition. The question as to whether or not there had been a sufficient legal transfer of the trust property (savings bank deposits) was not discussed, though in view of the analogy between savings bank books and stock certificates the question might have presented an interesting point, as it does not appear that the bank book itself was turned over.